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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY LEE ANDREWS,

Defendant and Appellant.

G055226

(Super. Ct. No. 12WF1461)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Reversed and remanded.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos, Heidi T. Salerno, and Christopher Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Danny Lee Andrews of second degree robbery and attempted second degree robbery and the trial court found true he suffered two prior serious felony convictions, including a federal bank robbery conviction (the federal conviction). The trial court sentenced Andrews to prison for 60 years to life, which consisted of two consecutive terms of 25 years to life for the offenses and two consecutive terms of five years for the prior serious felony convictions. In a nonpublished opinion *People v. Andrews* (May 26, 2016, G051067) (*Andrews*), we concluded there was insufficient evidence to establish the federal conviction qualified as a serious felony and strike. We reversed and remanded to allow the prosecution to retry the “strike allegations” if it chose to do so. On remand, the prosecution retried the federal conviction, with Andrews in absentia. The trial court imposed sentence.

On appeal, Andrews argues we must reverse the judgment and remand the matter because his right to be present was violated and he received ineffective assistance of counsel. After briefing was complete, we invited the parties to file supplemental letter briefs on the effect, if any, of Senate Bill No. 1393 (S.B. 1393), effective January 1, 2019, which amends Penal Code sections 667, subdivision (a), and 1385, subdivision (b).¹ The Attorney General concedes both that Andrews had a right to be present and S.B. 1393 is applicable to Andrews because the judgment will likely not be final before S.B. 1393 becomes effective. The Attorney General asserts, however, neither requires remand because he has not shown prejudice by his absence and he is not entitled to relief pursuant to S.B. 1393.

As we explain below, we reverse the judgment and remand the matter for resentencing because Andrews was prejudiced by his absence at resentencing, the trial court’s sentencing statements were inconsistent, and the court must consider the

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All further statutory references are to the Penal Code.

applicability, in the first instance, of S.B. 1393. The judgment is reversed and the matter is remanded.

FACTS

The underlying substantive and procedural facts may be found in *Andrews, supra*, G051067. The jury convicted Andrews of second degree robbery (§§ 211, 212.5, subd. (c)) (count 1), and attempted second degree robbery (§§ 664, subd. (a), 211, 212.5, subd. (c)) (count 2). At a bifurcated bench trial, the court found true Andrews suffered two prior strike convictions (§§ 667, subds. (d) & (e)(2)(A), 1170.12, subds. (b) & (c)(2)(A)),² and two prior serious felonies (§ 667, subd. (a)(1)), the basis for one of which was the federal conviction. The trial court sentenced Andrews to prison for 60 years to life as follows: count 1-25 years to life; count 2-25 years to life; and two five-year terms for the prior serious felony convictions (§ 667, subd. (a)(1)). The court struck the sentences for the four prior prison term allegations (§ 667.5, subd. (b)).

On remand, the trial court conducted proceedings without Andrews present in August, September, October, and December 2016. Before those proceedings, Andrews wrote to his trial counsel that he wished to be present for those proceedings. At the December hearing, the trial court admitted into evidence a section 969, subdivision (b), packet of the federal conviction without objection. The court concluded Andrews suffered the federal conviction.

As to sentencing, the court stated the following: “[Andrews] is not present. He’s not receiving a greater sentence so his presence is not required. He is resentenced only as to the prior. Actually, I’m restating the identical sentence as before as to the . . . two prior convictions . . . pursuant to . . . section 667[, subdivision (a)(1)]. And, as previously referenced herein, the court imposes an additional five-year term for each

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The trial court denied Andrews motion to dismiss his prior strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. (*Andrews, supra*, G051067.)

conviction -- I'm putting them all together at this time -- as to each of the counts, 1 and 2, for an additional 20-year term. This is a mandatory term for each indeterminate count. And this is also pursuant to [sections] 667[, subdivisions] (d)/(e)(2)(A) and 1170.12[, subdivisions] (b)/(c)(2)(A), the strike. And the court, again, strikes the punishment for the [section] 667.5[, subdivision] (b) priors. And the remaining -- well, the sentence is restated as previously set forth." The abstract of judgment reflected the court imposed consecutive terms of 25 years to life for counts 1 and 2.

DISCUSSION

Andrews argues his right to be present under the federal constitution and California statutes was violated and he was prejudiced because he was prevented from offering "post-incarceration" mitigating evidence. The Attorney General concedes the error, but asserts Andrews was not prejudiced because the evidence was irrelevant to his sentencing. We agree the matter must be reversed and remanded for resentencing.

"A criminal defendant has a constitutional right to counsel at all critical stages of a criminal prosecution, including sentencing. [Citations.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 453 (*Doolin*).) A defendant may waive his right to be present but the waiver must be voluntary, knowing, and intelligent. (*People v. Davis* (2005) 36 Cal.4th 510, 531.)

Here, the Attorney General concedes Andrews had a right to be present at his sentencing hearing, and he did not waive that right. We agree and accept the Attorney General's concession. Sentencing is a critical stage in the criminal prosecution. (*Doolin, supra*, 45 Cal.4th at p. 453; *People v. Dial* (2004) 123 Cal.App.4th 1116, 1122 [defendant right to be present and present evidence at sentencing, which is a critical stage]; Pen. Code, § 977, subd. (b)(1).) Andrews did not waive the right to be present at his resentencing, and in fact expressed his desire to his defense counsel to be present. He was not, and that was error.

The Attorney General argues, however, Andrews was not prejudiced because in *Andrews, supra*, G051067, our disposition was limited and we did not remand for the trial court to consider a motion to strike (*Romero, supra*, 13 Cal.4th 497), and postincarceration mitigation evidence would be inadmissible. We disagree.

In our disposition in *Andrews, supra*, G051067, we stated the following: “The judgment is reversed. Upon remand, the trial court shall vacate its true findings regarding the strike allegations. The prosecution may elect to retry the strike allegations by presenting additional evidence within the record of conviction. If the prosecution opts not to retry the strike allegations, the trial court shall enter ‘not true’ findings. In any event, the trial court shall resentence defendant.”

Contrary to the Attorney General’s suggestion otherwise, we did not prohibit the trial court from considering a *Romero* motion. In determining whether a defendant is outside the spirit of the Three Strikes law, a trial court “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant . . . should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).) At resentencing, Andrews may offer evidence of his background, character, and prospects. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 260 [manifestly unfair to permit trial court to exercise sentencing discretion without providing defendant and counsel opportunity to address merits].)

And, in any event, we ordered the trial court to resentence Andrews. “[T]he trial judge’s original sentencing choices did not constrain him or her from imposing any sentence permitted under the applicable statutes and rules on remand, subject only to the limitation that the aggregate prison term could not be increased. [Citation.]” (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1256.) Because we cannot

conclude the trial court's failure to require Andrews's presence was harmless, we must remand again for resentencing.

Additionally, a trial court's oral pronouncement of sentence controls over a conflicting abstract of judgment. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Mesa* (1975) 14 Cal.3d 466, 471.) Here, the trial court stated it intended to sentence Andrews to the same sentence he previously imposed, which would have been 25 years to life for each of counts 1 and 2. However, the court then stated he imposed 20 years for each indeterminate count. Because the oral pronouncement controls, and it conflicts with the court's other statements, and the abstract of judgment, we must also reverse the judgment and remand for resentencing on this ground.³

Finally, S.B. 1393 now gives a trial court the authority to dismiss or strike for sentencing purposes a prior serious felony conviction. (Stats. 2018, ch. 1013, §§ 1-2.) Section 667, subdivision (a), requires a trial court to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony," and section 1385, subdivision (b), *previously* forbid a trial court from striking that punishment. On September 30, 2018, the Governor signed S.B. 1393 which, effective January 1, 2019,⁴ amended sections 667, subdivision (a), and 1385, subdivision (b), to allow a court to exercise its discretion to strike or dismiss for sentencing purposes a prior serious felony conviction. (Stats. 2018, ch. 1013, §§ 1-2.)

In *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*), the California Supreme Court stated the following: "When the Legislature amends a statute so as to

³ Thus, we need not address Andrews's contention he received ineffective assistance of counsel.

⁴ The effective date of non-urgency legislation such as S.B. 1393, passed in 2018 during the regular legislative session, is January 1, 2019. (Cal. Const., art. IV, § 8, subd. (c)(1); Gov. Code, § 9600, subd. (a); *People v. Camba* (1996) 50 Cal.App.4th 857, 865.)

lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.” (See *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308 [*Estrada* rule rests on inference legislative body ordinarily intends for ameliorative changes to criminal law to extend as broadly as possible unless contrary indications].)

The Attorney General concedes S.B. 1393 applies retroactively to non-final judgments and “it appears” Andrews’s judgment will not become final before S.B. 1393 goes into effect.⁵ The Attorney General is correct on both counts. The Attorney General contends, however, remand would be a futile act for two reasons. First, the Attorney General contends Andrews is not outside the spirit of section 667, subdivision (a)’s five-year enhancement provision based on his history as a career criminal. Second, the Attorney General asserts the trial court previously denied Andrews’s *Romero* motion, rejecting his claim he was outside the spirit of the “Three Strikes” law, and thus would rule the same with respect to any section 1385 motion.

Perhaps, but the trial court is in a better position to exercise its informed discretion when making sentencing choices (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228), based on the nature and circumstances of the present felonies and prior serious/violent convictions and Andrews’s background, character, and prospects (*Williams, supra*, 17 Cal.4th at p. 161). Additionally, because of Andrews’s absence

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The Attorney General cites to the recently filed case out of the Fourth Appellate District, Division Two, *People v. Garcia* (2018) 28 Cal.App.5th 961, which held S.B. 1393 applies retroactively.

from the second sentencing hearing, and the trial court's inconsistent statements at that hearing, we conclude a third sentencing hearing is the most prudent course of action.

DISPOSITION

The judgment is reversed and the matter is remanded for resentencing.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.